Filed 4/5/10 In re K.B. CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re K.B., a Person Coming Under the Juvenile Court Law.	B215559
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. RENEE B., Defendant and Appellant, K,B., Appellant.	(Los Angeles County Super. Ct. No. CK74059)

APPEAL from a judgment of the Superior Court of Los Angeles County. D. Zeke Zeidler, Judge. Affirmed in part; reversed and remanded in part.

William Hook, under appointment by the Court of Appeal, for Defendant and Appellant Renee B.

M. Elizabeth Handy, under appointment by the Court of Appeal, for Appellant K.B.

Robert E. Kalunian, Acting County Counsel, James M. Owens, Assistant County Counsel, Judith A. Luby, Principal Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Renee B. (mother) and her daughter K.B. appeal from a juvenile court's dispositional order and orders regarding visitation. The court ordered an out-of-home placement instead of placing K.B. with mother. The court also conditioned mother's unmonitored visits on K.B. submitting clean drug tests. We affirm the juvenile court's disposition order placing K.B. in an out-of-home placement. We reverse in part and remand for further proceedings because we find the drug testing order lacked sufficient specificity to ensure appropriate testing or to safeguard K.B.'s privacy.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2008, 15-year-old K.B. called the Department of Children and Family Services (DCFS) because she had no place to live. Previously, she had served a 10-month probation period after being charged with grand theft auto. During her probation, she was placed in a residential facility. In March 2008, Renee B. (mother) was arrested and charged with receiving fictitious checks and known stolen property. She was sentenced to 16 months in prison after violating a previous 24-month probation. When K.B.'s probation ended in May 2008, mother was still in prison. Mother arranged to have father take K.B. home with him.

Father lived in Florida and worked as a diver.[1] According to K.B., father drank to excess and was away from home while working for up to 10 days at a time. K.B. said she and father did not get along, father yelled at her, and father had recently lost his apartment. Father bought K.B. an airplane ticket and sent her to live with her paternal grandmother in Montana. However, instead of staying with her paternal grandmother or returning to father, K.B. returned to California on her own and began living with

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[1] Father is not a party to this appeal.

relatives, including her maternal great-grandmother. In August 2008, when K.B. called DCFS, the maternal great-grandmother acknowledged she was unable to continue caring for K.B.

On August 20, 2008, DCFS filed a juvenile dependency petition asserting jurisdiction was proper under Welfare and Institutions Code section 300, subdivision (b)[2] due to mother's failure to make an appropriate plan for K.B.'s care during mother's incarceration; mother's history of substance abuse; father's history of alcohol abuse; and father's failure to provide K.B. with the necessities of life. The petition further alleged jurisdiction was proper under section 300, subdivision (g) because mother and father had failed to provide support for K.B. K.B. was detained and placed at a group home. The court ordered that K.B. was to participate in a drug treatment program, including random drug tests at least weekly. The test results were to be provided only to K.B.'s attorney and drug counselor.

Mother and K.B. both had histories of drug use. Although mother denied ever having a drug problem, she admitted previously using marijuana on a regular basis and methamphetamines for a one-year period. Records also showed that mother was arrested several times between 1998 and 2005 for being under the influence of a controlled substance or in possession of a controlled substance. K.B. admitted she had a history of substance abuse and that she engaged in regular use of illegal narcotics.

In late December 2008, mother was released from prison. She began weekly visits with K.B. and maintained regular telephone contact. She also enrolled in parenting classes and drug counseling, and submitted negative drug tests. K.B. was placed in a residential treatment facility where she experienced a "rough adjustment." Staff at the facility reported that K.B. had trouble following directions, and was noncompliant, disrespectful, and verbally aggressive, although by February 2009, she had made some progress. She was also receiving counseling for her substance abuse.

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[2] All further statutory references are to the Welfare and Institutions Code.

In February 2009, mother told DCFS she wanted to continue reunification services but felt it would be in K.B.'s best interest for her to stay at her out-of-home placement "where she could continue to address her substance abuse issues, anger management issues and focus on doing well in school." Mother intended to secure employment and her own residence, and believed it would be premature for K.B. to be placed with her at the maternal great-grandmother's home. She further told DCFS she felt "that once both she and [K.B.] have complied with their programs and she has secured gainful employment as well as a residence, that she'll be able to exercise proper and effective control of [K.B.]."

At a February 2009 jurisdiction hearing, mother pled no contest to the petition. The court dismissed the allegations that mother failed to provide support for K.B. or make arrangements for her care during her incarceration, but otherwise sustained the petition.

By April 2009, staff at K.B.'s residential treatment facility reported that K.B. was making progress, but she was not sufficiently participating in all aspects of her chemical dependency program. K.B. "presented as manipulative and seemed to believe that her continued complaints would result in her returning to home sooner. [¶] [K.B.'s former case manager][3] expressed concern that [K.B] seemed to manipulate mother and put pressure on her to get her out of placement. [The case manager also] stated that she had concerns that [K.B.]'s return to mother at this time would be premature due to mother having issues of her own requiring resolution."

Indeed, mother had not fully complied with the case plan. She attended only one conjoint family therapy session with K.B., and cancelled three other scheduled sessions for unknown reasons. Mother only marginally participated in her own substance abuse treatment program. Eventually, she was granted a one-month medical leave of absence

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[3] By the time of DCFS's April 2009 report, K.B. was newly placed in a group home closer to mother's residence. DCFS interviewed the staff from the previous facility.

from the program due to the death of her father and pregnancy complications.[4] She was terminated from her parenting education program due to excessive absences. However, she had consistently submitted negative random drug tests, except on one occasion when she was with her father in the hospital before he died.

At the April 2009 disposition hearing, mother's counsel indicated mother and K.B. had two weeks of 12-hour unmonitored visits because K.B. was not enrolled in school, and they had successful overnight visits as well. Mother requested that K.B. be returned to her custody. K.B. also requested that she be allowed to return to mother's home. She further indicated her dissatisfaction with her current school at the group home and requested that DCFS look into placing her in a regular school. The court expressed confusion about the status of K.B.'s enrollment in school:

> "THE COURT: Wait. Wait. [¶] Now, I have got that the school she is in is crap and she is going to mom's everyday instead of school and I have got mom saying that she is not in school every day, that's why it's okay she's coming to her house every day.
>
> "[K.B.'S COUNSEL]: According to [K.B.], she went yesterday for the first time and met the teacher and saw what her class is like. The school was supposed to start today. She was to have started yesterday. She went into the school and saw what the class was going to look like and she was on spring break prior to that."

The court inquired about K.B.'s drug treatment program and asked K.B. how she felt about undergoing a drug assessment to determine whether she needed further drug counseling. K.B. responded: "I don't want to go. I already know my program. I know how to run it."

The court did not place K.B. with mother and ordered DCFS to make a suitable placement. It explained: "There are two dynamics going, one is the . . . parent[s'] actions and the extent to which that limits their parental capacity and the other half is [K.B.]'s behavior and to the extent which she believes that she is in charge of the program, and running the program, and parent[s'] lack of ability to deal with that. [¶]

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4 Mother apparently discovered she was pregnant in March 2009.

Substantial danger exists to her physical and emotional health. Notice is proper. Department provided reasonable services to prevent removal."

The court again ordered that K.B. participate in a drug treatment program and that DCFS make a referral for K.B. for weekly random drug tests. The court ordered unmonitored visits for mother as long as she was in compliance with the case plan, which included attending parenting and drug rehabilitation programs, submitting weekly random drug tests, and participating in conjoint counseling with K.B. The court added: "The unmonitored visits are only on as long as [mother] continues to be in compliance and her unmonitored visits are conditioned upon [K.B.]'s testing clean." Mother and K.B.'s appeals followed.

DISCUSSION

I. Substantial Evidence Supported the Juvenile Court's Disposition Order

Mother and K.B. challenge the juvenile court's disposition order removing K.B. from mother's custody. We find substantial evidence supported the court's order.

"[W]e review the record in the light most favorable to the dependency court's order to determine whether it contains sufficient evidence from which a reasonable trier of fact could make the necessary findings by clear and convincing evidence. [Citation.]" (*In re Mariah T.* (2008) 159 Cal.App.4th 428, 441.)

Under section 361, subdivision (c)(1), a dependent child may not be taken from the physical custody of the parents with whom the child resides at the time the petition was initiated unless the juvenile court finds by clear and convincing evidence "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's . . . physical custody." (§ 361, subd. (c)(1).)

"The jurisdictional findings are prima facie evidence that the child cannot safely remain in the home. (§ 361, subd. (c)(1).) The parent need not be dangerous and the child need not have been actually harmed for removal to be appropriate. The focus of the

statute is on averting harm to the child. [Citations.] In this regard, the court may consider the parent's past conduct as well as present circumstances. [Citation.]" (*In re Cole C.* (2009) 174 Cal.App.4th 900, 917 (*Cole C.*).)

Substantial evidence supported the juvenile court's finding there was or would be a substantial danger to K.B.'s physical or emotional well-being if she were returned to mother's care. Only two months before the disposition hearing, mother told DCFS she was not ready to have K.B. returned to her care. Following that interview, mother's situation grew even less stable. Mother was not complying with her case plan which required that she attend parenting classes and a drug treatment program. Mother had expressed her desire to secure employment and her own residence before having K.B. returned to her care, but there was no indication that she had been able to accomplish either goal. Instead, mother was living in a two bedroom home with five other people. Although mother had successful visits with K.B. after being released from prison, mother failed to attend conjoint family therapy sessions with K.B., as required by the case plan.

At the same time, there was evidence that K.B. was exhibiting difficult behaviors that would need addressing. K.B. was not fully complying with her own drug treatment program. It appeared to staff at her placement that K.B. was manipulating mother into requesting that she be returned home even though mother was not ready. It further appeared at the hearing that K.B. had for two weeks spent all day and evening with mother rather than being in school, but whether her absence from school was legitimate was unclear.

In short, following mother's statement in February 2009 that she was not ready to care for K.B. and felt that K.B. should remain in a placement where she could work on anger management, substance abuse issues, and doing well in school, little changed for the better. Further, mother had not taken the opportunity to attend family therapy sessions with K.B., mother had not followed through on other crucial aspects of the case plan, and K.B. also appeared to be struggling to work on her substance abuse issues, even while at the group home placement.

Moreover, mother's difficulty in adequately caring for K.B. was not limited to a single incident. K.B. described her childhood as marred by parental conflict, parents who abused drugs and alcohol, and emotional abuse. She told DCFS that when living with mother in the past they had often lived in motels and she and her sister were left alone at a motel for days at a time. In March 2007, DCFS received a report that K.B. was smoking marijuana and not attending school, and that mother was away for days at a time. Although "[a]ll persons interviewed" denied K.B. was using drugs or that mother was frequently absent, K.B. admitted she frequently skipped school. From October 2007 to March 2008, K.B. was placed with DCFS due to "caretaker absence." In October 2007 and March 2008, two of K.B.'s aunts reported they no longer wanted to care for K.B. because she was too much trouble. The record does not clearly indicate why K.B. was living with one aunt, and then another, instead of living with mother. However, despite these gaps in information, the record creates a strong inference that even before mother was incarcerated she was unable to adequately care for K.B. At the time of the detention, mother was incarcerated. Although mother made the initial plans for K.B. to live with father during mother's incarceration, K.B. was adrift at the time the petition was filed and appeared to be coming up with her own living arrangements. This history raised substantial concerns that mother's previously expressed belief that she was not ready to care for K.B., combined with her failure to comply with the case plan, demonstrated the risk to K.B. in returning her to mother's home.

Mother cites a number of cases she asserts presented facts far more egregious than those at bar, yet the court found removal from the parent's custody was inappropriate. We find these cases inapposite. Unlike the situations presented in *In re Basilio T.* (1992) 4 Cal.App.4th 155, and *In re Jamie M.* (1982) 134 Cal.App.3d 530, here, there was substantial evidence K.B. had already suffered harm due to mother's conduct and risked suffering future harm from the same. Mother's inability to adequately care for K.B. was not limited to a single incident, as was the case in *In re Henry V.* (2004) 119 Cal.App.4th 522. Further, mother was not complying with her case plan and admitted only a short time before the disposition hearing that she was not ready to care for K.B. In contrast, in

In re Steve W. (1990) 217 Cal.App.3d 10, 23, the mother had exercised "exemplary effort to resume" parenting her child.[5] The juvenile court's removal order in this case was proper.

Alternatives to Removal

Mother and K.B. further contend the juvenile court did not consider less restrictive alternatives to removal or erred by not explicitly considering and rejecting less drastic alternatives to removal on the record. We disagree.

"Before the court removes a child from parental custody, it must find there are no reasonable means by which the child's physical health can be protected without removal. (§ 361, subd. (c)(1).)" (*Cole C.*, *supra*, 174 Cal.App.4th at p. 918.) "The court shall make a determination as to whether reasonable efforts were made to prevent or to eliminate the need for removal of the minor from his or her home . . . . The court shall state the facts on which the decision to remove the minor is based." (§ 361, subd. (d).) "Although the court must consider alternatives to removal, it has broad discretion in making a dispositional order. [Citation.]" (*Cole C.*, at p. 918.)

Here, as in *Cole C.*, "substantial evidence shows that [DCFS] made reasonable efforts to prevent the need for [K.B.'s] removal, but that such measures were not sufficient in the end to protect [K.B.]." (*Cole C.*, *supra*, 174 Cal.App.4th at p. 918.) DCFS provided mother with referrals for parenting education classes, drug counseling, and random drug testing. Mother complied only with the random drug testing; she enrolled in parenting education classes and drug counseling, but was terminated from the classes for excessive absences, and took a medical leave from the drug counseling program after several absences. K.B.'s group home facilitated family therapy for K.B. and mother, but mother failed to attend all but one of the scheduled sessions. (*In re H.E.* (2008) 169 Cal.App.4th 710, 725 [the agency is entitled to rely on services from private agencies and individuals].)

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[5] In several of the cases mother cites, the issue before the Court of Appeal was not the disposition order. (See *In re Andres G.* (1998) 64 Cal.App.4th 476; *In re Matthew S.* (1996) 41 Cal.App.4th 1311; *In re Jeffrey P.* (1990) 218 Cal.App.3d 1548.)

Mother herself told DCFS she did not think she would be able to exercise proper and effective control of K.B. until they both had complied with their programs, and mother had failed to comply with her program by the time of the disposition hearing. In light of K.B.'s past truancy, drug use, and criminal activities, mother's ability to exercise proper and effective control was extremely important. Substantial evidence supported the court's finding that no reasonable means to protect K.B. were available without removing her from mother's custody.

In finding K.B. could not safely return to mother's custody, the "court necessarily considered but rejected the alternative of placing" K.B. with mother and ordering services or supervision. (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1137, disapproved of on another point in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6.) Further, the juvenile court offered a factual basis for its order, albeit a brief one: the court explained that K.B.'s parents' limitations in their ability to deal with K.B.'s behavior placed her at risk. But even if the court's statement was insufficient as a factual basis for the order under section 361, subdivision (d), "any error is harmless because it is not reasonably probable such findings, if made, would have been in favor of continued parental custody. [Citation.]" (*Diamond H.*, at p. 1137.)

II. The Juvenile Court's Visitation and Drug Testing Order

K.B. challenges the juvenile court's order requiring her to submit clean drug tests in order to have unmonitored visits with mother. K.B. argues this order violated her rights to privacy and family preservation. While we find the order was properly imposed, we conclude it did not include adequate guidelines to safeguard K.B.'s privacy and therefore reverse that limited portion of the court's order and remand the matter to the juvenile court for further proceedings.

We are guided in our analysis by *In re Carmen M.* (2006) 141 Cal.App.4th 478 (*Carmen M.*). The case concerned a minor, Carmen, who was declared a dependent child and placed in a group home. The juvenile court ordered Carmen to submit to a drug test if the group home staff believed her to be under the influence of drugs. (*Id.* at p. 485.) Carmen objected that the court had no discretion to make the order and that it violated her

fundamental right to privacy. The Court of Appeal disagreed. The court noted provisions in the Welfare and Institutions Code that authorize the court to make all reasonable orders for the care and supervision of a dependent child, and direct the court to secure custody, care, and discipline for the child as close as possible to that he or she should have received from parents. (*Id.* at p. 486, citing §§ 202, subd. (a), 362, subd. (a).) The court indicated these provisions were broad and comprehensive enough to include an order "for continued drug testing of a dependent child who has admitted a substance abuse problem." (*Id.* at p. 486.)

The court further determined that a properly limited court order for drug testing does not violate a dependent child's fundamental right of privacy. Although the child's privacy rights are implicated, the court reasoned that a minor's right to privacy "differs significantly from the rights enjoyed by adults. [Citations.] Thus, in most instances a parent has the legal right to act on behalf of his or her child, including authorizing a medical procedure or test, to protect the child's health and well-being." (*Carmen M.*, *supra*, 141 Cal.App.4th at pp. 492-493.) When a child becomes a dependent of the court, the juvenile court assumes the parent's role, "as well as the parent's authority to limit the child's freedom of action. [Citations.]" (*Id.* at p. 494.)

The court noted that Carmen had a recent history of drug abuse and responded well to drug treatment programs. Continued testing promised to be a "constructive tool for her continued sobriety. . . . [¶] In view of the specific and documented justification for the order for continued drug testing and the express condition that testing occur only if there is a reasonable suspicion Carmen M. has been using drugs, we are persuaded the juvenile court's legitimate interest in closely monitoring Carmen M.'s recovery fully supports the order's limited intrusion on Carmen M.'s right to privacy." (*Carmen M.*, *supra*, 141 Cal.App.4th at p. 494.)

K.B. acknowledges the juvenile court's broad discretion to make orders for the care, supervision, and discipline of a dependent child, as well as the court's ability to order a child to drug test under some circumstances. However, she contends the court

abused its discretion by linking the drug testing and visitation orders, and further that there was no basis for the court to require her to take drug tests. K.B. argues the dependency petition was filed because of parental absence, not her drug abuse, and the drug testing order improperly served to penalize her. In addition, she asserts the order was not specific or limited enough to safeguard her privacy, and that it impinged on her right to family preservation.

We disagree that the juvenile court's order requiring K.B. to take drug tests was unjustified. K.B. admitted to a history of drug use and to regular drug use at the time the petition was filed. In October 2008, K.B. ran away from her placement and later admitted she had used drugs while AWOL. By April 2009, staff at K.B.'s placement reported that she was not sufficiently participating in all aspects of her chemical dependency program. At the disposition hearing, the juvenile court asked K.B. if she would be willing to participate in an assessment to determine whether additional drug counseling was even necessary. K.B. rejected this suggestion, stating that she already knew her program and how to "run it." This raised further questions about the extent to which K.B. had overcome her substance abuse problems. In its role as parent, the court could reasonably order continued drug testing as part of K.B.'s drug treatment program.

There was also a reasonable basis for the court to order that mother's visits with K.B. could not be unmonitored if K.B. was not testing clean. The juvenile court has broad discretion to determine the terms and conditions of visitation. (*In re Julie M.* (1999) 69 Cal.App.4th 41, 48.) Only if " ' "the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination," [citation]' " will we reverse such an order. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318, quoting *In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 421.) Here, mother had her own history of substance abuse, which she largely denied, and at the time of the disposition hearing she was unable to continue in her drug treatment program. In addition, there was a perception that K.B. was manipulating mother. Although mother and K.B. were having unmonitored visits without incident, it appeared at the disposition hearing that K.B. had day-long unmonitored visits with mother during times she should

have been in school. Further, the staff at her placement reported that K.B. was not fully complying with her drug treatment program.

In this context, an order that mother's visits with K.B. be unmonitored only so long as K.B. submitted clean drug tests could reasonably and properly be made for K.B.'s protection. The court could rightfully be concerned that if K.B. relapsed and began using drugs again, unmonitored visits with mother would be detrimental to K.B. This was particularly the case in view of K.B.'s attempts to manipulate mother, mother's past inability to effectively or properly exercise control of K.B., and mother's apparent belief that she would be able to exercise effective and proper control of K.B. once they were both complying with their case plans—a condition that had not yet fully come to pass. Although K.B. interprets the court's order as punishment, it can equally be interpreted as the court exercising its responsibility to step into the role of parent and create a reasonable limitation on visits with mother should K.B. fall back into drug use. The order did not limit whether visitation would occur, the frequency of visits, or the duration of visits, thus the effect of the court's order on family preservation was relatively minimal.

However, the drug testing order, while proper in principle, failed to set procedural safeguards for administering the tests and disclosing the results. In *Carmen M.*, the court discussed the concerns that arise when a drug testing order of a dependent child does not contain "express limitations or guidelines . . . as to the type of test to be conducted (for example, blood or urine), the manner of administering the test or the scope of disclosure of test results." (*Carmen M.*, *supra*, 141 Cal.App.4th at pp. 494-495.) The court noted that "[t]he use of highly invasive procedures that unnecessarily disregard the child's privacy interests when less intrusive alternatives are feasible weighs heavily in any state constitutional privacy case." (*Id.* at p. 495.) In *Carmen M.*, the juvenile court's order contained implicit direction that testing be conducted in the manner it had been before at Carmen M.'s treatment facility, and which she had not challenged. However, the Court of Appeal suggested that "in general any such order [requiring drug testing of a dependent child] should provide for the least intrusive, reliable method of testing and

shield test results and other sensitive personal information from unnecessary disclosure, consistent with the purpose for which testing has been ordered." (*Id.* at p. 496.)

In this case, the juvenile court's earlier order that K.B. submit to drug testing specified that the results were to be provided only to K.B.'s attorney and drug counselor. The court did not repeat this limitation at the disposition hearing. The new order contained no limitations on disclosure. Respondent argues the first order remained in effect throughout the proceedings, thus implicit in the court's second drug testing order was a limitation that the test results only be disclosed to K.B.'s attorney and drug counselor, as before. But such a limitation would appear to be at logistical odds with the purpose for which the court made the order. If visits need to be monitored because K.B. submits a dirty drug test, presumably at least someone at DCFS will need to be made aware of this fact so that it may arrange a monitor.

Further, the juvenile court's previous drug testing order appeared to require drug testing in connection with K.B.'s drug treatment program and placement. The April 15 order required K.B. to participate in a drug treatment program, but separately required that DCFS make a referral for K.B. for drug testing. It is therefore unclear whether the testing was to take place within the context of K.B.'s ongoing drug treatment program or otherwise. This lack of specificity made it impossible to ensure that the least intrusive, reliable method of testing would be employed. In addition, the lack of detail was especially problematic because the court's order required frequent random testing, which already placed a significant burden on K.B.'s privacy. (Cf. *Carmen M., supra*, 141 Cal.App.4th at p. 494 [noting the drug testing order created only a limited intrusion on Carmen's privacy because it did not authorize random testing and required her to test only if the group home staff believed she was under the influence].)

While the juvenile court reasonably ordered that K.B. undergo drug testing and that mother's visits be monitored if K.B. did not submit clean drug tests, the actual order did not adequately protect K.B.'s privacy rights because it failed to include any guidelines about how the test should be administered, and because it also failed to include any limitations on disclosure of the results. We reverse the court's drug testing order as

to these limited issues and remand the matter to the juvenile court to enter an order that ensures the least intrusive reliable method of testing is used, and that places limits on disclosure of the results so as to safeguard K.B.'s privacy.

DISPOSITION

The juvenile court's order placing K.B. in an out-of-home placement is affirmed. The juvenile court's order requiring drug testing is reversed and this matter is remanded for further proceedings in accordance with this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BIGELOW, P. J.

We concur:

RUBIN, J.

FLIER, J.